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90-1819

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

DENNIS QUALLS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Does The Duty Of A Railroad Under The Federal Employers' Liability Act Extend To Protecting Against Injuries Sustained As The Sole Result of Slipping On Natural Accumulations Of Ice And Snow On The Railroad's Right-Of-Way Out In The Open Countryside.

2. What Constitutes "Other Circumstances" Disconnected From The Mere Presence Of Snow And Ice So As To Impose A Duty On A Railroad Under The Federal Employers' Liability Act To Protect Against Natural Accumulations Of Snow And Ice In The Open Countryside.

PARTIES BELOW

The parent company of the Petitioner, St. Louis Southwestern Railway Co., is the Southern Pacific Transportation Company.

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri, which is unreported, is appended hereto at pages A-1 to A-7. The opinion of the Missouri Court of Appeals, is unreported, but is appended hereto at pages A-8 to A-12.

JURISDICTION

The judgment or decree of the Supreme Court of Missouri was entered on November 20, 1990. No petitions for rehearing have been or will be filed with the state courts. The Supreme Court of Missouri stayed the enforcement of its judgment or decree by order entered on

December 14, 1990. This court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).[1]

STATUTORY PROVISIONS INVOLVED

35 Stat. 65, As Amended, 45 U.S.C. Section 51.

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees."
>
> "Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such

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[1] While the Supreme Court of Missouri remanded the cause for a new trial on the ground of error in giving a jury instruction, this case falls within the rule of finality for purposes of 28 U.S.C. Section 1257(a) as announced in *Cox Broadcasting Corp. vs. Cohen*, 420 U.S. 469, 482, 95 S.Ct. 1029, 43 L.Ed.2d 328, 342 (1975). The decision of the Supreme Court of Missouri is final on the federal issue of whether there is a duty on the part of railroad employers under the FELA to remove accumulations of snow and ice from, at the very least, all bridges along the railroad right-of-way out in the open countryside before allowing employees to walk or work thereon. While it is true that Petitioner may prevail on the merits on retrial, if the Supreme Court of Missouri erroneously imposed a duty on the Petitioner under the FELA, federal law forecloses further proceedings in the state court. Even if Petitioner prevailed on the merits on retrial, denying review of the federal issue now would leave in effect the unreviewed decision of the State Supreme Court which raises important implications concerning the practical operations of railroads in wintertime and a decision, the effect of which, makes railroads insurers of their employees' safety contrary to the federal policy underlying the enactment of the FELA. *Inman vs. Baltimore & Ohio R. Co.*, 361 U.S. 138, 140, 80 S.Ct. 242, 4 L.Ed.2d 198, 201 (1959).

employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficient, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or equipment."

STATEMENT OF THE CASE

The Evidence

The Respondent, Dennis Qualls, was a laborer employed in that capacity by the Petitioner, St. Louis Southwestern Railway Company, since 1973. (A-2) As a laborer, Respondent worked as part of a gang which repaired track. (A-8) On the morning of December 6th, 1984, the gang was taken by bus to a location in the open country approximately twenty-five (25) miles from the nearest railroad yard. (A-8) To get to the work site, about a mile away from where the gang was dropped off by bus, Respondent and his fellow workers walked between the rails on the railroad right-of-way. (A-2, 8)

The weather was cold and snow and ice were on the ground as a result of a snow storm that had occurred the night before. (A-2) Descriptions as to the amount of snow on the ground ranged from "deep" to "quite a bit" to three to four inches. (A-8) Snow continued to fall that morning when the men walked to the work site. (A-3, 8) Those weather conditions were not unusual for the Respondent and his gang to be working in. (S. R. 18)[2] Along the railroad right-of-way was an open deck trestle bridge over which the gang had to cross to reach their work site. (A-2, 9) An open deck bridge is one in which there are spaces open to the ground several feet below between the cross ties. (A-3, 9) Open deck bridges are typical of those the Respondent's gang frequently crossed in the course of their work. (A-9) Although some bridges have walkways and handrails, this one was not so equipped. (A-3)

---

[2] Supplemental Transcript on Appeal.

After crossing the bridge once, Respondent realized he had left his hood on the bus and returned by himself over the bridge to retrieve it. (A-3, 9) The bus had already left. He turned back to walk over the bridge a third time. While on the bridge, Respondent thought he heard a train whistle and turned. (A-3, 9) As he turned, Respondent slipped on the snow and ice and fell onto the bridge injuring his back. (A-3, 9) Subsequently, Respondent filed a lawsuit against Petitioner under the Federal Employers' Liability Act alleging the failure to provide a reasonably safe place to work.

At trial, co-workers of the Respondent testified that they too had trouble crossing the bridge due to the slippery conditions and had to walk "real slow" to get across the bridge. (A-3) However, none of Respondent's co-workers, numbering between thirty-five and fifty, fell down while crossing the bridge. (A-8, 12).

How Federal Questions Were Presented

Petitioner asserted its federal questions at every appropriate level of the Missouri court system.

In the first instance, the Petitioner raised the federal question at issue by way of oral motion for directed verdict at the close of the plaintiff's evidence, as follows:

> "PETITIONER'S ATTORNEY: At the close of the plaintiff's evidence, defendant moves for a directed verdict in favor of the defendant and against the plaintiff.
>
> The reason is that the evidence put in the record is to the effect that this man fell while working outside, and outside of yard limits. That the only condition was snow and ice which fell out of the sky. No other conditions.
>
> It is the defendant's position that it does not owe any duty of any kind to either prevent that from happening, clean it up in any way, or put anything on it, when the snow is outside the yard limits." (S.R. 3)

In response to these contentions, the trial court stated as follows:

> "THE COURT: The oral motion of defendant for directed verdict at close of the plaintiff's case now being submitted will be overruled and denied." (S.R. 3)

Petitioner raised the same federal question at the close of all of the evidence by moving for a directed verdict. (S.R. 40-41) The trial court overruled and denied defendant's oral motion for directed verdict. (S.R. 41) Following a jury verdict in favor of the plaintiff, Petitioner moved for judgment notwithstanding the verdict in its written post-trial motion on the federal ground that under the Federal Employers' Liability Act, an injury as the result of slipping on natural accumulations of ice and snow outside the yard limits does not make a case of negligence against the railroad. (C. 79-80) The argument of counsel on the motion was not recorded, but the federal claim here was vigorously argued to the trial court at that time. The trial court denied Petitioner's motion for judgment notwithstanding the verdict, but granted its motion for new trial on e basis of error in a jury instruction. (C. 81-82, 137)

In the Missouri Court of Appeals, Petitioner raised its federal claim by way of a cross-appeal of the order of the trial court denying its motion for judgment notwithstanding the verdict. In response to the federal question raised, the Missouri Court of Appeals concluded:

> "In the case before us the only cause of plaintiff's fall was his slipping on the accumulated snow and ice.... We have found no cases, and have been cited to none, where liability has been imposed upon a railroad in an FELA case for injuries sustained as a sole result of slipping on snow and ice on the railroad's right-of-way in a remote area outside the yard. The rule heretofore set forth establishes that no duty exists generally for the railroad to protect against such a hazard and its failure to do so does not establish that the place of work is not reasonably safe." (A-11, 12)

Respondent filed a timely motion for rehearing or transfer to the supreme court in the Missouri Court of Appeals which was denied. A

timely filed application to transfer was made by the Respondent in the Supreme Court of Missouri. The issue raised by Respondent in his application to transfer was whether the decision of the Missouri Court of Appeals erred in finding as a matter of law that the Petitioner had no duty to protect against climatic conditions in furnishing a reasonably safe place to work. The Supreme Court of Missouri granted Respondent's application to transfer.

In its unpublished decision, the Supreme Court of Missouri recognized that under the Federal Employers' Liability Act, "specific rules have developed relating to the employer's duty to keep the work place free of ice and snow." (A-4)

> "Outside the switch yard or terminal area . . . there is no duty to protect employees from 'injuries resulting from the mere existence of ice or snow and disconnected from other circumstances.' (*Raudenbush, supra*, 160 F.2d at 366; *Banta vs. Union Pac. R.R.*, 242 S.W.2d 34, 39 (Mo. 1951)" (A-4)

Applying the above principle to the facts of the case, the Supreme Court of Missouri concluded:

> "Given all the circumstances, it is impossible to say with confidence that the employer could not foresee the menace faced by employees whose assignment required them to walk on foot across an ice and snow covered open-deck trestle that had no walkways or handrails, or that the employer had no reasonable ability to take precautions to remove the dangers inherent in crossing the bridge by providing instruments or utensils, such as sale or cinders, to remove the ice and snow. (A-5)

REASONS FOR GRANTING THE WRIT

1. The Decision Of The State Supreme Court Conflicts In Principle With The Decisions Of The Third Circuit, Fifth Circuit and Seventh Circuit United States Courts of Appeals As To The Physical And Practical Limits Of A Railroad's Duty Under The Federal Employers' Liability Act To Protect Against Conditions Of Ice And Snow In Furnishing Their Employees A Reasonably Safe Place To Work.

Under the Federal Employers' Liability Act (45 U.S.C. Sec. 51), the general rule is that since railroad companies have no control over the vagaries of the weather or climatic conditions, there is no duty on the part of a railroad to protect employees from "injuries resulting from the mere existence of ice or snow and disconnected from other circumstances." *Raudenbush vs. Baltimore & O. R. Co.*, 160 F.2d 363, 366 (3rd Cir. 1946); *Fort Worth & Denver City Ry. Co. vs. Smith*, 206 F.2d 667, 669 (5th Cir. 1953); *Anderson vs. Elgin, Joliet & Eastern Ry. Co.*, 227 F.2d 91, 95-96 (7th Cir. 1955). There exists an exception to that general rule where the ice and snow accumulation exists in the railroad's yard. (*Id.*)

The undisputed evidence, in the instant case, was that the only cause of Respondent's fall was slipping on the naturally accumulated ice and snow on the bridge. (A-3, 9, 11) There was no pretense that the bridge would still have been hazardous to walk on if it were free from accumulated ice and snow. The bridge, even without handrails or a walkway, was typical of those frequently encountered by the Respondent and his gang in their work along the railroad right of way. (A-9, 11-12)

Despite the fact that there was no defective condition of the bridge in and of itself, the Supreme Court of Missouri held that when snow and ice accumulated thereon, there was a duty on the Petitioner to remove the ice and snow from the bridge to protect against injuries before directing their employees to walk across. (A-5) That holding squarely conflicts with the principle that there is no duty to protect

against injuries resulting solely from the mere existence of ice and snow outside of the yard limits as contained in the decisions of the United States Courts of Appeals heretofore cited.

2. The Decision Below Raises Significant And Recurring Federal Issues Affecting The Practical Operations of Railroads In Wintertime.

Railway companies exist not alone for private gain, but for the public was well. They are subject to federal regulation and control. They owe a duty not only to their employees working on their tracks, such as Respondent, but they also owe a duty to protect the freight of their shippers and the lives of their and other railroads' employees operating trains on their track. To oblige the latter duties, it is imperative that railroad right-of-ways receive constant care and supervision, regardless of the weather conditions.

The general rule restricting a railroad's duty to within its yard limits reflects the practical limitations of a railroad's ability to remove or protect against snow and ice accumulations along its entire length of track. The degree or care to be exercised by a party must have some reasonable relationship to the ability of the party upon whom the duty is cast, to perform such a duty. *Raudenbush, supra,* 160 F.2d 363, 367. However, while there is no liability generally for the failure to remove accumulations of ice and snow from the right-of-way out in the open countryside, if the injury results from some "other circumstance" set apart from the mere existence of snow and ice, liability can result. *Raudenbush, supra,* 160 F.2d 363, 366.

No definitive guidelines have been laid down by the United States Courts of Appeals as to what would constitute "other circumstances" besides the mere presence of ice or snow so as to impose a duty under the FELA to protect against such accumulations. Without such guidelines, which should be set by this Court, non-uniformity will result and railroads will be subject to liability for their failure to anticipate what "other circumstances" besides the mere existence of snow and ice they must protect against.

For example, in the instant case, the Respondent was merely walking across a bridge, typical in kind of ones frequently encountered by him in his work along the railroad right-of-way, when he slipped on ice and snow which had naturally accumulated. (A-11, 12) There was no evidence that the accumulations of ice and snow were any different on the bridge than on the rest of the one mile stretch of track Respondent's gang walked on to get to their job site. The only difference alleged was with regard to the underlying construction of the track. On the bridge, the spaces between the cross ties were open to the ground several feet below. Whereas, on the remainder of the right-of-way, the ground was directly underneath the cross ties.

The Supreme Court of Missouri implied in its decision that the open space between the cross ties on the bridge was another "circumstance" disconnected from the mere presence of ice and snow so as to impose a duty on Petitioner to provide instruments or utensils, such as salt or cinders, to remove the ice and snow. (A-3, 4-5) Implicit in the Supreme Court of Missouri's decision is the imposition of a duty on railroads to protect against each and every prospective "circumstance" which might render the footing less certain than anywhere else on the right of way when snow or ice accumulate.

To accept the Supreme Court of Missouri's construction, any conceivable deviation along the entire length of track, such as a bridge, curve, bump, hill or slight incline or decline, would amount to "other circumstances" warranting removal of ice and snow before subjecting employees to walk or work thereon. In continuing snow storms especially, the practical effect of the Supreme Court of Missouri's holding is to render operation of a railroad company thoroughly impossible during wintertime. It would require railroads to employ enumerable men and women around the country to be laden with loads of salt, cinders or sand ready to be applied on every bridge, curve, crevice, hill, etc. at the start of, during and after any adverse weather, with no guarantee that such applications would not blow away. Moreover, during the removal process, all work by the other employees must stop until the walking or working surface has been made safe. Then, while removing the danger of injury from natural accumulations of ice and snow before allowing their maintenance-of-way employees

to begin repairing track, railroads will be exposed to liability for damage to their shipper's freight and injury to their other employees as a result of operating trains on defective track. As a consequence, railroads will have to choose between shutting down their entire operations at the start of any adverse weather or being subject to liability for exposing their employees to weather conditions.

The intent of the Federal Employers' Liability Act was not to make the employer an insurer against injuries suffered by its employees. *Inman vs. Baltimore & Ohio R. Co.*, 361 U.S. 138, 140; 80 S.Ct. 242; 4 L.Ed.2d 198, 201 (1959). Accumulations of ice and snow are an unavoidable incident of railway employment in wintertime. There are dangers in every employment and danger in a particular phase of an employment does not necessarily imply negligence. *McGiven vs. Northern Pac. Ry. Co.*, 132 F.2d 213, 217 (8th Cir. 1942). To impose a duty on railroad employers to remove ice and snow from every location along its right-of-way where the possibility of slipping is greater than on a straight and level stretch of track would render them insurers of their employees safety during wintertime. Yet, that result is the practical consequence of the Supreme Court of Missouri's decision.

As has been carefully pointed out herein, the Supreme Court of Missouri's decision in this case conflicts *in principle* only with the decisions of the United States Courts of Appeals. In *Raudenbush, Fort Worth & Denver City Ry. Co.* and *Anderson, supra*, the employees were injured within the yard limits. Thus, the exception to the general rule was applicable. The only United States Court of Appeals decision uncovered which might have involved an accident away from the yards is *Chicago & N. W. Ry. Co. vs. Rieger*, 326 F.2d 329 (8th Cir. 1964). In *Rieger*, however, the negligence of the railroad was premised not solely upon the presence of snow and ice. Rather, in addition to weather conditions, it was alleged that a curve in the track caused loading operations to be not reasonably safe to perform. *Rieger, supra*, 326 F.2d at 332-333.

Here, in contrast, the only allegation of negligence was in directing the Respondent to walk across an open deck bridge, typical in kind of

the type frequently encountered by him, upon which snow and ice had naturally accumulated. To allow the decision below to stand and to be used as a guideline for other courts to gauge what can constitute "other circumstances" will open up serious question to the economics of continued employment of maintenance-of-way workers in wintertime.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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February, 1991

APPENDIX

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APPENDIX A

SUPREME COURT OF MISSOURI

en banc

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No. 72683

DENNIS QUALLS,
Plaintiff-Appellant/
Cross-Respondent,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Defendant-Respondent/
Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY

Honorable William A. Geary, Jr., Judge

Plaintiff Dennis Qualls obtained a jury verdict on his claim against defendant St. Louis Southwestern Railway Company (the railroad) under the Federal Employers Liability Act, 45 U.S.C.A. § 51, *et seq.* (West. 1986) (FELA). Defendant filed a "post-trial motion" requesting the judgment be set aside and that judgment be entered for defendant or, alternatively, a new trial be granted. The trial court set aside the judgment and ordered a new trial. The parties filed cross-appeals. Following opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer. Affirmed.

I.

The trial court's basis for granting a new trial was error in the giving of an instruction, MAI 24.01 (1981). Plaintiff's solitary point on

appeal is that the instruction given was not erroneous. Respondent's cross-appeal counters with a single point, apparently[1] claiming plaintiff failed to make a submissible FELA case because plaintiff's evidence established no duty toward plaintiff that was violated by defendant.

The granting of a new trial eliminated the adverse judgment against defendant from which it might have appealed. § 512.020, RSMo 1986; *Community Title Co. v. Roosevelt Federal Savings & Loan Ass'n*, slip op. at 2 (Mo. banc 1990) (No. 72315, decided September 11, 1990). Nevertheless, the cross-appellant's brief raised the issue of submissibility of plaintiff's case and the question must be addressed. *Id.* at 3. In determining whether plaintiff made a submissible FELA case, the Supreme Court views the evidence in a light most favorable to the jury's verdict and afford the prevailing party the benefit of all reasonable inferences that may be drawn from the evidence. *Melton v. Ill. Central Gulf R.R.*, 763 S.W.2d 321, 324 (Mo. App. 1988).

II.

Qualls was first employed as a laborer by the railroad in 1973 and continued in that employment until the injury that is the subject of this suit. On the morning of December 6, 1984, he was a member of a work crew assigned to work on a section of track. The crew was staying in a motel in Cape Girardeau. The weather was quite cold, with ice and snow on the ground. The crew was taken by bus to a point about a mile from where they were to work. From there Qualls and his fellow workers began walking along the railroad right-of-way and across a bridge toward the location where labor was to be performed. About one-tenth of a mile from where the crew disembarked from the bus, Qualls discovered he had left his hood on the bus. Qualls returned back

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[1]The point relied on in cross-appellant's brief asserts, "The trial court erred in finding there was a duty on the part of defendant to eliminate the natural conditions of ice and snow along a one-mile stretch in the open country." A diligent search of the record discloses that the trial court made no such finding, nor is such factual finding hypothesized in the trial court's instructions. If this Court relied on the statement of the point to justify review, it is doubtful that any further discussion would be necessary. Mo. Rules of court 84.04(d).

across the bridge to retrieve his hood from the bus. He discovered the bus had departed. He turned again to walk toward the work site. At that point Qualls was alone and carrying a five- to ten-pound maul used for driving railroad spikes. As Qualls was crossing the bridge for the third time, he though he heard the sound of a train whistle.

This particular bridge, or trestle, is what is referred to as an open-deck bridge. The tracks sit on the cross-ties. Between the cross-ties are spaces that are open to the ground several feet below. A single set of tracks traverses the length of the bridge. Although some bridges have walkways and handrails, this one was not so equipped. On that day, the bridge was particularly slippery because of freezing rain and snow, which had fallen the night before and continued to fall that morning. Co-workers of Qualls testified they had trouble crossing this particular bridge, apparently because of the combined effects of the open deck design, absence of handrails or walkways and the slippery conditions on the bridge. One co-worker slipped more than once while crossing the bridge but was uninjured. Another managed to get across by using his maul as a cane to provide additional support. No cinders or salt were used on the bridge and no one on the crew was assigned to remove ice or snow from the trestle.

As Qualls heard what he believed to be a train whistle, he turned. As he turned, he slipped and lost his balance. He fell onto the bridge, to his back and to one side. At the same time his feet were going through the cross-ties. To keep from falling from the bridge and to the ground some five to six feet below, Qualls held onto the bridge. He immediately experienced low back pain, which radiated into his legs. He got to his feet, proceeded to the place where the work was being performed, and reported the injury to his fellow employees and his foreman.

III.

The railroad does not deny that it has a duty to provide plaintiff with a reasonably safe place to work or that if its negligence played any part, even the slightest part in producing plaintiff's injury, then a submissible case is made under FELA. *See Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). It argues, however, that it may not be held liable for

injuries sustained from the mere existence of ice and snow outside the yard limits.

The duty to provide a reasonably safe workplace contemplates that the employer will take "precautions commensurate with the dangers to be encountered in the circumstances" and the question of reasonableness depends "upon the danger attending the place or the machinery." *Britt v. Terminal R.R. Ass'n of St. Louis*, 311 S.W.2d 130, 133 (Mo. App. 1958), quoting *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943). The phrase "reasonably safe place to work" is a term of relative application, which requires the employer to eliminate those dangers that could be removed by the exercise of reasonable care by the employer. *Raudenbush v. Baltimore & O.R.R.*, 160 F.2d 363, 366 (3rd Cir. 1947). However, the employer is not an insurer of his employee's safety. *Hightower v. Edwards*, 445 S.W.2d 273, 275 (Mo. banc 1969).

From the above general principles, more specific rules have developed relating to the employer's duty to keep the workplace free of ice and snow. Within a railroad switch yard or terminal area where cars and locomotives are being moved and employees must move with celerity to perform their duties, the employer, within its reasonable ability to do so, is "required to exercise reasonable care to prevent an accumulation of snow and ice in such quantity and location as would constitute a menace to the employees in the performance of their work." *Raudenbush*, 160 F.2d at 366; *see also Britt v. Terminal R.R. Ass'n, supra*, and *Zibung v. Union Pac. R.R.*, 776 S.W.2D 4 (MO. BANC 1989).

Outside the switch yard or terminal area the duty of the employer to keep the workplace free of ice and snow is somewhat different. In the open countryside traversed by trains and the railroad right-of-way, the railroad has little control over the vagaries of weather and climatic conditions. Thus, there is no duty to protect employees from "injuries resulting from the mere existence of ice or snow and disconnected from other circumstances." *Raudenbush*, 160 F.2d at 366; *Banta v. Union Pac. R.R.*, 242 S.W.2d 34, 39 (Mo. 1951).

Applying the above principles to the case at hand, it is apparent that the existence of ice and snow was not the only circumstance playing

a role in the fall and injury that plaintiff sustained. Given all the circumstances, it is impossible to say with confidence that the employer could not foresee the menace faced by employees whose assignment required them to walk on foot across an ice and snow-covered open-deck trestle that had no walkways or handrails, or that the employer had no reasonable ability to take precautions to remove the dangers inherent in crossing the bridge by providing instruments or utensils, such as salt or cinders, to remove the ice and snow. *See McGivern v. Northern Pac. Ry.*, 132 F.2d 213, 217-18 (8th Cir. 1942). Under the totality of the connected circumstances and viewing the evidence favorably to plaintiff, a reasonable person could conclude that the railroad had failed to provide Qualls with a reasonably safe workplace. Plaintiff made a submissible case.

IV.

The plaintiff's single point on appeal is that the trial court erred in granting a new trial. The basis of granting the new trial was a determination by the trial court that plaintiff's verdict directing instruction was erroneous. The instruction, designated as "Instruction No. 7," was patterned after MAI 24.01. it stated,

Your verdict must be for plaintiff if you believe:

> First, defendant failed to provide reasonably safe conditions for work, and
>
> Second, defendant in the respect submitted in paragraph first was negligent, and
>
> Third, such negligence resulted in whole or in part in injury to plaintiff.
>
> Unless you believe plaintiff is not entitled to recover by reason of Instruction No. 8.

The Notes on Use Under MAI 24.01 state:

> In the event plaintiff submits some act of negligence, constructive knowledge of which is not chargeable to the railroad, there

> shall be submitted in addition a paragraph providing "defendant knew or by using ordinary care should have know [sic] of such condition, and that such condition was reasonably likely to cause substantial harm." This paragraph should be inserted between existing paragraphs Third and Fourth and the paragraph should be renumbered accordingly.

Implicit in the Notes on Use explanation as to when the additional paragraph should be used is the idea that the judge must decide whether the plaintiff has presented sufficient evidence to justify not submitting the issue to the jury. If the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition, the additional paragraph is not required. *Foltz v. Burlington N.R.R.*, 689 S.W.2d 710, 715 (Mo. App. 1985).

In the case at hand, one of the factors making up the allegedly unsafe condition was the accumulation of ice and snow. There was some disagreement in the testimony as to the extent of the accumulation of ice and snow and whether the bridge was slippery. Under such circumstances there was an issue of fact as to defendant's actual or imputed knowledge of the condition. Defendant's knowledge of the condition is an essential element of plaintiff's case that must be submitted to the jury. The trial court did not commit error in finding that plaintiff's verdict directing instruction was improper and in granting a new trial.

The Notes on Use direct that the paragraph "be inserted between existing paragraphs Third and Fourth and the paragraph renumbered accordingly." Placing the paragraph submitting the question of whether the employer knew of unsafe conditions after the paragraph submitting the issue of whether the employer failed to provide reasonably safe conditions for work is illogical.

On retrial in this case and in all cases tried after publication of this opinion in the *Southwestern Reporter* where the issue of an employer's knowledge of an unsafe condition must be submitted, the additional paragraph shall be inserted before paragraph Second of MAI 3d 24.01. The paragraph should provide "defendant knew or by the exercise of

reasonable care could have known of unsafe conditions and that such conditions were reasonably likely to cause substantial harm." The directions in the Notes on Use are to be disregarded to the extent that they are inconsistent.

Accordingly, the order setting aside the judgment and granting a new trial is affirmed.

John C. Holstein, Judge

Blackmar, C. J., Robertson, Rendlen, Higgins, Covering, JJ., and Seiler, Sr. J., concur. Billings, Jr., not sitting.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 56352

DENNIS QUALLS,
Plaintiff-Appellant/
Cross-Respondent,

vs.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,
Defendant-Respondent/
Cross-Appellant.

Appeal from the Circuit Court of St. Louis City

Hon. Wm. A. Geary, Jr., Judge

OPINION FILED: March 6, 1990

Both parties appeal from the order of the trial court granting defendant's motion for new trial but denying its motion for judgment notwithstanding the verdict in this FELA case. We need consider only the defendant's appeal.

Plaintiff was a laborer employed by defendant in its maintenance of the way department. In that capacity he worked as part of a gang in repairing track. On December 6, 1984, the gang, consisting of 35 to 50 men, was assigned to repair track at a location in open country approximately twenty-five miles from the nearest yard. The gang was transported by bus to a location near the work site and then was required to walk approximately a mile to the site itself. The gang walked between the rails to reach the work place. A snow storm had occurred the night before and snow was still falling when the men walked to the work site. Plaintiff testified the snow was "deep." One witness placed its depth at 3 to 4 inches. Another said there was "quite a bit." It was also cold and windy.

Plaintiff walked a short distance with the rest of the gang and in so doing crossed an open deck bridge approximately 25 feet across. An open deck bridge is one in which there is no flooring between the ties. The bridge was typical of those over which the gang frequently crossed in the course of their work. It had no handrails or walkway. Plaintiff had left his hood on the bus and returned by himself to the bus to retrieve it. The bus had already left. In returning to the bus area plaintiff by necessity recrossed the bridge. He then again began walking to the job site. While on the bridge he thought he heard a train whistle and turned to see if a train was coming. At that point he slipped on the snow and ice and fell onto the ties. The fall injured his back. He arose and continued walking to the job site. He was subsequently taken to a hospital but returned later in the day to the job site although he was unable to perform his usual work.

Plaintiff's verdict-director hypothesized that "defendant failed to provide reasonably safe conditions for work" and that such failure was negligent, resulting in plaintiff's injuries. The jury returned a verdict for plaintiff of $700,000 and assessed no fault to plaintiff. The trial court granted defendant's motion for new trial on the basis that the verdit-director failed to hypothesize defendant's knowledge, actual or constructive, of the unsafe condition. The trial court denied defendant's motion for judgment notwithstanding the verdict. We find the latter ruling to be erroneous.

The duty of the railroad is to provide to the employee a reasonably safe place to work. The railroad is not the insurer of the safety of its employees, however. The test is whether reasonable or ordinary care has been exercised by the employer to provide a safe place to work. There are dangers in every employment and danger in a particular phase of an employment does not necessarily imply negligence. *McGivern v. Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir. 1942) [8-16]. The degree of care to be exercised by a party must have some reasonable relationship to the ability of the party upon whom the duty is cast, to perform such duty. *Raudenbush v. Baltimore & O.R.Co.*, 160 F.2d 363 (3 Cir. 1947) [4].

In determining the duty of the railroad it has been universally recognized "since railroad companies have no control over the vagaries of the weather or climactic [sic] conditions that there is no liability for injuries resulting from the mere existence of ice or snow and disconnected from other circumstances." *Id.* [2,3]. There exists an exception to that general rule where the ice and snow accumulation exists in the railroad's yard. *Britt v. Terminal Railroad Association of St. Louis*, 311 S.W.2d 130 (Mo. App. 1958) [I]. The reason for that exception is stated in *Melody v. Des Moines Union Ry. Co.*, 161 Iowa 635, 141 N.W. 438 (1913) [1.2] as:

> "A switch yard is a switchman's place of work. The nature of his duties requires him to traverse the yard in almost every direction, both day and night. Much of his movements has to do with the making up of trains, the coupling, uncoupling, assembling, and distribution of cars. He must move with celerity. The service is at best essentially dangerous, and he must be ever alert of eye and ear to avoid being run over or caught and crushed between cars. He cannot always take careful note of his footsteps to make sure of his path, and within reasonable limits he must and rightfully may rely upon his employer to see that there are no traps or pits or obstructions into or over which he may fall to his injury, save only such as pertain to the proper and necessary preparation and equipment of the yard for its intended use. True, a railway company having no control over the laws of nature is not negligent simply because snow falls upon yards; but snow having fallen thereon, we cannot say, as a matter of law, that the company may without neglect of duty leave it there indefinitely and permit it to become worn or trodden into icy mounds, ridges and slopes at places where its switchmen are required to go in the performance of their work, thus exposing them to the danger of slipping and falling to their serious injury."

It is apparent from the cases that the courts in establishing the duty of the railroad in regard to accumulations of ice and snow have not found it reasonable to require the railroad to remove or protect against such accumulations along its entire length of track. To do so would impose a burden upon the railroad having no reasonable relationship

to the danger involved. Failure to provide such protection does not constitute the failure to provide a reasonably safe place to work. Imposition of such duty would make the railroad an insurer of its employees' safety which is not required under the negligence concepts of FELA.

Plaintiff cites us to several cases which it contends expand the yard exception beyond the yards themselves. In *Zibung v. Union Pacific Railroad Company*, 776 S.W.2d 4 (Mo. banc 1989) the accident occurred on the parking lot of the defendant as plaintiff was leaving work. The court held that the jury could have believed that an inch of ice had accumulated and that the defendant had equipment available to alleviate the hazardous condition and did not do so. The court did not expressly address the issue before us as to the physical limits of the railroad's duty. We are unable to correlate that fact situation to that before us involving a section of track far out in the country where the accumulation of snow was recent and continuing and where no evidence of equipment reasonably available to remove the accumulation was presented.

Chicago & North Western Railway Company v. Rieger, 326 F.2d 329 (8 Cir. 1964) involved an accident presumably away from the yard. There, however, the negligence of the defendant was not premised solely upon the presence of snow and ice but rather upon that condition combined with a peculiar configuration of the track causing the means of performing a loading operation to be unsafe. The court stated:

> "It is sufficient to say that under the circumstances reasonable prudence would require doing the work in a manner to compensate for the weather and the curve in the track. The jury could find that this required a deviation from normal in order to have a reasonably safe place to work and to be reasonably sure that the equipment would work in a sufficient manner." 1.c. 334.

In the case before us the only cause of plaintiff's fall was his slipping on the accumulated snow and ice. He and the rest of the gang were wearing rubber cleated shoes. The bridge was typical of those

frequently encountered by the gang in their work. No unusual conditions existed except the snow and ice. No other employee fell; plaintiff crossed the same bridge successfully twice before the accident. One of plaintiff's witnesses testified that if you were careful you could get across the bridge all right if you walked "real slow." No one had required the men to walk other than real slow. We have found no cases, and have been cited to none, where liability has been imposed upon a railroad in an FELA case for injuries sustained as a sole result of slipping on snow and ice on the railroad's right of way in a remote area outside the yard. The rule heretofore set forth establishes that no duty exists generally for the railroad to protect against such a hazard and its failure to do so does not establish that the place of work is not reasonably safe.

Plaintiff contends that the cases establishing the general rule predate *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) which held that any negligence on the part of the railroad, no matter how slight or small was sufficient to establish liability under FELA. For negligence to exist there must exist a duty. The thrust of the cases establishing the rule on climatic conditions is premised upon the absence of duty to protect against such conditions in furnishing a reasonably safe place to work. In the absence of that duty there can be no negligence slight, small or great. *Rogers* does not change that proposition.

The order of the trial court denying defendant's motion for judgment notwithstanding the verdict is reversed and the cause remanded with directions to enter judgment for defendant.

/s/ Gerald M. Smith, Judge

Satz, P.J.; Grimm, J., concur

APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

December 14, 1990

Mr. John B. Gunn
P. O. Box 1387
St. Louis, MO 63188

In re: Dennis Qualls vs. St. Louis Southwestern Railway Co.,
No. 72683 (Circuit Court No. 852-5195)

Dear Mr. Gunn:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Defendant-Respondent/Cross-Appellant's motion for stay pending review on certiorari sustained on condition that said defendant furnish $5000.00 bond to secure costs, to be approved by the Circuit Court of the City of St. Louis."

Very truly yours,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

cc: C. Edward Moorman
Freeman Bosley, Clerk, Circuit Court, City of St. Louis
Hon. William A. Geary

APPENDIX D

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 852-5195
Division No. 7

DENNIS QUALLS,
Plaintiff,

vs.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, a corporation,
Defendant.

ORDER

This cause having been tried in this division and the jury having found in favor of plaintiff and against defendant and thereafter said defendant having filed it's [sic] Post-Trial Motion, filed November 14, 1988 and submitted to the Court January 27, 1989, and the Court now being fully advised in the premises, it is the ORDER of the Court that said Post-Trial Motion be and is hereby SUSTAINED in part, as to the Alternative Motion For New Trial contained therein (Part III, (p4)(4)), and the Judgment heretofore entered in this cause in favor of Plaintiff and against Defendant is hereby SET ASIDE, vacated and for naught held, for good cause shown, for the reason and on the grounds stated in Part III, paragraph 4, page 4, pp. 5, 6. (Post-Trial Motion).

Rule 78.03 VAMS, 1989.

Accordingly, this Cause is returned to Division 1 to be reset for the purpose of a new trial on all issues.

Dated: February 10, 1989 SO ORDERED:

/s/ Wm. A. Geary, Jr., Judge

cc: Mr. Edward Moorman
Mr. John B. Gunn
Attorneys of Record